BEFORE THE NATIONAL LABOR RELATIONS BOARD

SBM MANAGEMENT SERVICES	)	
	)	
Respondent	)	**Case Nos.: 05-CA-129128**
	)	**05-RC-126500**
-and-	)	
	)	
INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL, UFCW	)	**REPLY BRIEF IN FURTHER SUPPORT OF UNION'S CROSS-EXCEPTIONS**
Charging Party	)	

Now comes the Charging Party, the International Chemical Workers Union Council (Union), by and through the undersigned counsel, and hereby timely files the following reply brief in further support of its cross-exceptions to the Decision of Administrative Law Judge Arthur J. Amchan (Judge) issued in the above-captioned matter (Decision).

I. INTRODUCTION

After Respondent SBM Management (SBM or Company) filed its exceptions to the Decision, the Union timely filed five cross-exceptions with supporting brief, three of which were directed to the remedy, while one was directed to conforming the Notice to the Order, and one was directed to challenging the admission of Respondent Exhibits 3 and 4. Thereafter, SBM filed "Respondent's Reply Brief and Brief in Opposition to the Charging Party's Exceptions." (SBM Reply). While the real question is whether there was a past practice of providing Great Job "bonuses" to potential unit employees *in the same type of dramatic fashion and timing as on May 16*, SBM misleadingly asserted in its reply that the Union "recognize[d] that SBM provided bonuses previously." (SBM

Reply, p. 4).[1/]

As to the Union's cross-exceptions and arguments based on the timing and "visually electrifying" manner in which SBM distributed the so-called Great Job "bonuses" in a "dramatic" -- as the Judge described them -- manner, SBM's only response was that the Union's argument was nothing more than self-serving, theatrical misdirection. Yet, SBM did not deny that it *never* previously distributed bonus checks of *any* amount publicly in front of other employees, let alone done so in such an unusual and "dramatic" fashion as occurred on May 16. (JD, p. 5, line 19).

As to the Union's concern that, if SBM should lose its maintenance contract for the Merck facility and, therefore, the remedial order, as it now stands, would not require it to post the Notice *anywhere* where the affected employees would *ever* see the Notice, SBM's only response was weak: if losing a contract were a legitimate basis to require notices to be mailed to all former employees, then mailing notices would be required for every violating contractor.

SBM's retort to the Union's request that its highest local management official have to read the Notice at a meeting similar to the one at which he dramatically violated the Act by handing out the bonuses in front of nearly all of the potential bargaining-unit was weak and concise, but ignored the Union's arguments for such a remedy, while building a strawman: According to SBM, such

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[1/]SBM cited to the Union's Answering Brief at pages 3-4 to support its misleading contention. However, the Union questioned whether the safety poker game was even a similar "bonus" program to the Great Job program, placing quotation marks around the word "bonus" to draw even more into question SBM's misleading contention.

As to SBM's Great Job "bonus" contention, the Union did not concede that there was any evidence that such so-called "bonuses" were given to potential *unit*, as opposed to non-unit, employees in January, 2014, for alleged December, 2013, work; how much those so-called bonuses were for *each* individual in January, or how long after the work purportedly was done in December before the bonuses were distributed in January. More significantly, these so-called "bonuses" were not distributed in front of other employees. (T. 157) (Respondent Exhibit 4, p. 275).

a remedy would be required for every alleged violation and simply was not the law.

SBM did not contest the Union's position that the proposed "Notice" language was inconsistent with the Order; it merely asserted that the "Notice" language was sufficient.

As to the Union's cross-exception challenging the admission of Respondent Exhibits 4 and 5, SBM merely argued that they were properly admitted as business records, that they were authenticated, and that they represented bonus payments at *many* locations around the Country. SBM did not respond to the Union's position that these exhibits, or at least portions of the exhibits, were not adequately described, identified, or were irrelevant, at least to the extent that they reflected so-called "bonuses" distributed at facilities elsewhere, particularly since it was undisputed that each facility devised its own incentive programs, nor the Union's position that there was no evidence that potential unit employees were even aware of any SBM bonus programs elsewhere.

II. LAW AND ARGUMENT

While SBM argues that the election was close, that is not legally relevant here. While the record may not be clear on this point, the Union had a substantial majority of cards when it filed its Petition. As the Board has long recognized, the test is an objective one, *i.e.*, were SBM's actions the type that one would expect to interfere with the laboratory conditions required for an election.

Despite the Union -- in its Answering Brief and its brief supporting its cross-exceptions -- challenging SBM to justify the timing and unique manner in *how* it distributed the Great Job bonuses, SBM continues to fail to even respond to that challenge, or attempt to justify the timing or uniqueness of its bonus-distribution process on May 16. The question is not only whether SBM had a past practice of paying Great Job bonuses at Elkton -- this is doubtful -- but also whether it has had a past practice of distributing any type of bonus with the timing and the "dramatic" fashion by which

it chose on May 16. SBM simply has ignored these latter critical issues, failing even to attempt to justify them. SBM's failure to even acknowledge the seriousness of how its dramatic violation affected the employees and how the effects may continue to linger on only strengthens the Union's arguments that the recommended remedies must be strengthened.

Similarly, even though the Union challenged SBM to justify and identify which potential Elkton *unit* employees received so-called Great Job bonuses in January, 2014, allegedly for work done in December, 2013; to describe the amount of *each* such bonus; and to tie any testimonial evidence to documentary evidence to support such contentions, SBM continues to fail to do so. If there is any evidence on these issues, it is all, presumably, within SBM's control. SBM's failure to bring forth such evidence, or explain its absence, in and of itself, speaks loudly about the weakness of any past-practice evidence of Great Job bonus payments *at Elkton to unit employees*, let alone any past practice of distributing them in the unique manner utilized on May 16.

Cross-Exception No. 1: The Judge, in issuing his remedy, failed to take into account the situation that might occur if the Respondent should lose its contract at the facility and, thereby, prevent Respondent SBM from posting the Notice, even if the facility remains open with a different contractor with different employees.

While SBM asserts that the Union's position would require all contractors to mail notices to its employees, the Union disagrees. It doesn't. For instance, a successor contractor, who hires all of the Respondent's employees and takes the subcontract with notice of the violation, may have to post the Notice, but a new contractor may not hire any of Respondent's employees, or be required to post the Notice, if it is not a Golden State "successor," who is unaware of the prior violations.

Nevertheless, the Board has broad authority to tailor its remedies to insure that the *affected* employees know that the violations have been remedied:

> "The Board has '"broad discretionary" authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act.' In exercising that authority, the Board crafts its posting requirements to ensure that a respondent employer actually apprises its employees of the Board's decision and their rights under the Act. For example, in *Indian Hills Care Center*, the Board modified its standard posting requirement to make clear that, whenever a respondent's facility closes during the pendency of the Board's proceedings, the respondent must mail the notice to its former employees to ensure that they are notified of the outcome, as posting the notice at the closed facility will not serve to notify the employees of its contents. The Board also tailors its posting requirement to adapt to varying circumstances on a case-by-case basis. Thus, for example, in *Garment Workers*, the Board ordered the notice be mailed to the employees' homes as well as posted at the respondent's headquarters, because the employees were assigned to various field locations and might not visit headquarters during the posting period. Similarly, in *Best Roofing Co.*, the Board found that, in view of the nature of employment in the construction industry and because the respondent operated its business out of a private home, requiring posting solely at the respondent's place of business would be inadequate to inform its employees of their rights under the decision. Therefore, the Board ordered the respondent to post the notices at its jobsites as well as at its place of business and to furnish signed copies of the notice to the union for posting at the union's office and meeting places."

In Re Tech. Serv. Solutions, 334 NLRB 116, 117 (2001)(footnotes omitted). The Union established in its earlier brief why the order should be modified to address the possible circumstances here. SBM failed to adequately rebut the Union's position. This cross-exception should be sustained.

Cross-Exception No. 2: The Judge should have required SBM to mail copies of the Notice to all former SBM employees, who had been employed as of the date of the unfair labor practice.

Similarly, the Union established that, if SBM should lose its contract, or go out of business, it should be required to mail the Notice to its current or former employees, etc. SBM questions whether going out of business is a legitimate concern requiring the Notice to be mailed to all former employees. However, the Board already has answered that question in favor of the Union's position. *Id*.; Care Initiatives, Inc., 321 NLRB 144 (1996). The Board has ordered the mailing of its Notice to affected employees, such as discharged employees, even when the employer has not gone out of

business, or even if the facility has not closed. *See, e.g.*, Pro Works Contracting, Inc., 362 NLRB No. 2 (2015). The Union submits that such a remedy should extend not only to discharged employees, but also to those employees who have been coerced, such as those here, in the exercise of their Section 7 rights, who may no longer be employed.

Again, SBM has not effectively rebutted the Union's previously-asserted arguments and this cross-exception should be sustained.

Cross-Exception No. 3: The Judge should have required SBM to read the Notice at a meeting similar to the meeting at which it violated the Act.

SBM's only response to the Union's request that its highest local management official be required to read the Notice at a meeting similar to the one at which he violated the Act in front of almost the entire potential bargaining unit is that such a remedy "would also be required for every alleged violation" and that this "is simply not the law as illustrated by the Union's failure to cite any case law requiring such 'theatrical' remedies." (SMB Reply, p. 5). Essentially, SBM has not challenged the Union's request on its merits.

Contrary to SMB's response, the Union has not requested a public-reading remedy for all violations and it did cite Carey Salt Co., 360 NLRB No. 38 (2014). In that case, while the ALJ had not granted the public-reading requirement, the Board sustained the General Counsel's exception and amended the order to include such a requirement. Such a notice-reading requirement is more than appropriate here, where the employer does not have its own facility, but is providing maintenance for another company's facility, particularly when the violation "dramatically" was committed in front of nearly the entire unit by the highest-ranking local management official:

> "The reading of the notice 'will ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the Respondent's bulletin boards.' Federated Logistics, *supra,* 340 NLRB at 258,

> *quoting* Excel Case Ready, 334 NLRB 4, 5 (2001). The 'public reading of the notice is an "effective but moderate way to let in a warming wind of information and, more important, reassurance.'" McAllister, 341 NLRB at 400."

Homer D. Bronson Co., 349 NLRB 512, 515 (2007), *enf'd,* 273 Fed Appx 32, 184 LRRM 2213 (2d Cir. 2008).

While the judge in Carey Salt did not grant the public-reading remedy, he did hold that, "Just as respondent used email to break the law, so it should be ordered to use email to undo the harm." *Id*., slip op. at p. 14. Similarly, just as SBM's highest-ranking local management official violated the Act in front of the entire unit, so should he similarly remedy that violation.

Cross-Exception No. 4: The Notice should be conformed to be consistent with the Order.

Significantly, SBM has not excepted to the breadth or scope of the Judge's remedy by which he ordered it to cease and desist from "In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."[2/] The Union, however, cross-excepted that the proposed Notice was not consistent with that portion of the Order and requested that the Notice be conformed to be consistent with the Order. SBM's only response is that the Notice on that issue is sufficient. SBM does not address the Union's contention that the Notice is inconsistent -- as it is -- with the Order.

Since SBM has not challenged the Order as overbroad and, thereby waived any such challenge, the question is not whether the Notice is sufficient; the question is whether the Notice is consistent with the Order. It isn't. Consequently, the Notice should be brought into conformity with the Order.

[2/] SBM only excepted to the recommended remedy in its entirety on the basis that it did not commit an unfair labor practice; it has not excepted to, or argued against, the scope or breadth of the remedy in the event that the finding that it committed a violation of the Act is sustained.

Cross-Exception No. 5: The Judge should not have admitted Respondent Exhibits 4 and 5.

SBM's only documentary support for alleged "Great Job" bonus payments to potential unit employees prior to May, 2014, at the Elkton facility on which SBM relies is Respondent Exhibit 4 at page SBM 000**275**, even though no mention is made of bonuses, the Great Job incentive program, the individuals, or separate amounts involved:

> "BRIAN WEGEMER TARGET 00020719 $ 145.00 Team Building Gift Cards for Employees - Overtime work was scheduled and used dollars from that OT work to pay for these."

The Union cross-accepted to the admission of Respondent Exhibit 4. SBM responded that this exhibit was properly authenticated and described by SBM Director of Strategic Accounts Michael Peckally and, thus, properly admitted. However, prior to its admission, Counsel for the General Counsel strenuously objected on various grounds, including relevancy; and that the exhibit was not fully or adequately described by the witness. Instead, at best, it was described by Respondent's legal counsel, which is not admissible testimonial evidence. (T. 171-78).

Significantly, Peckally described Respondent Exhibit 4 as being used to tie the incentives or gift cards back "to an employee for tax reasons" (T. 173, line 6-7), though the portion of the exhibit relied on by SBM is not consistent with SBM's argument. The only "employee" identified on the portion of the exhibit relied on by SBM, purportedly for tax reasons, is Brian Wegemer, the plant manager at the time (T. 40). Any bonus payments *to him* cannot be the basis of any past practice payments to potential *unit* employees.

According to Respondent's own witness, if the exhibit was for tax purposes and SBM is arguing that it establishes a past practice of paying bonuses to several potential unit employees for

work done in December, 2013, but paid in January, 2014, one would have expected the exhibit to have identified each prospective unit employee, who received part of the $145.00 of the so-called Great Job bonuses, as well as the amount that each such employee received. Yet, none of that is identified on the exhibit, nor was there any testimonial evidence about how this money was broken down, or to whom it supposedly was distributed. Indeed, the document can be as easily interpreted as being payment of overtime pay as it is for bonuses.

Peckally did not describe the document as an SBM business record, nor did he identify the page that purportedly showed the Great Job "bonuses" allegedly paid by Brian Wegemer. Only SBM's counsel made such "identifications." (T. 175, line 8; 176, line 10).

The Judge expanded on Counsel for the General Counsel's relevancy objection to Respondent Exhibit 4 describing it also as an objection to an insufficient foundation. (T. 172). Respondent's counsel never adequately established that foundation, nor the relevancy of the document, before admitting that exhibit.

Similarly, Counsel for the General Counsel objected to the admission of Respondent Exhibit 5 on relevancy grounds, at least to those portions covering facilities other than the Elkton facility. (T. 181).[3/] The Union cross-excepted to admission of that exhibit. SBM apparently has conceded to the Union's relevancy arguments: The Union previously established that information on Respondent Exhibit 5 regarding SBM's purported past-practices *elsewhere* was irrelevant, since it was uncontested that SBM did not have a company-wide incentive program and that each facility established its own policies on that matter; that Elkton was the only facility that did triple cleans; and

[3/]The employees, Cruz, Figueroa, Mendoza, and Adame, that SBM identifies in "Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision" at p. 4, as receiving "Great Job" bonuses, were not employed in the State of Virginia, since their State's number is "14" and Virginia's is "47." (T. 181); Respondent Exhibit 5, pp. SBM 00003-4.

that there was no evidence that potential unit employees had any awareness of SBM's so-called bonus policies *elsewhere*. SBM's only response to the cross-exception is that the exhibit was properly described and admitted as a business record.

Since Respondent Exhibit 5 was not adequately described and did not even clearly differentiate those Virginia facilities at issue from those that were not (T. 181-82), there simply were multiple reasons why the exhibit should not have been admitted. Regardless of whether it was a business record, authenticated, or adequately described, it was not relevant.

IV. CONCLUSION

For the reasons stated above and in its earlier briefs, the Union's cross-exceptions, in whole or in part, should be granted.

Respectfully submitted,

s/Randall Vehar

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been sent this 27th day of February, 2015, via email to the following:

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